



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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B-177032

December 5, 1972

Dear Mr. Pellarzi:

We refer to your letter of September 12, 1972, requesting our determination as to whether employees of the Border Patrol, a component of the Immigration and Naturalization Service, are entitled to overtime compensation in accordance with the provisions of 5 U.S.C. 5542 under the circumstances recited therein.

You indicate that the Border Patrol agents concerned are assigned to duty at the El Centro, California headquarters, but that for more than one-half of their regular workdays they are assigned to either of two regular traffic checkpoints, both of which are located some 35 to 37 miles distance from headquarters. These two checkpoints are manned 24 hours a day and agent assignments are generally made 3 to 4 days in advance.

Before reporting to a regular traffic checkpoint, agents are required to report to headquarters to receive special instructions or last minute changes of assignments, to check out Government vehicles and to perform the other functions enumerated in your letter, all of which are preliminary to their departure by Government vehicle to the assigned checkpoint. They then drive the Government vehicle to the checkpoint upon arrival at which their regular 8-hour tour of duty commences. At the end of those 8 hours they return by Government vehicle to headquarters, park the vehicle, perform maintenance functions with respect to the vehicle, write and file reports of the day's activities, and perform the additional ministerial functions described in your letter.

You indicate that agents are not permitted to drive their own vehicles to the checkpoints or to bypass their chores at headquarters. You further indicate that the responsibilities at headquarters consume 10 to 15 minutes prior to departure for a checkpoint and a like amount of time after returning to headquarters; and further that 45 to 50 minutes are required to travel in each direction between headquarters and the checkpoints. Thus, agents perform such duty and travel for a total of approximately 2 hours on each day they are assigned to a regular checkpoint.

Prior to May 7, 1970, four shifts of agents were assigned to each of the checkpoints, requiring each agent to spend 6 hours at

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the checkpoint and permitting the aforescribed duties and travel to be included in the regular 8-hour tour of duty. Effective May 7, 1970, the scheduling of assignments was changed to provide for three shifts, thus requiring each agent to man the checkpoint for a full 8-hour tour of duty, with the result that the preliminary and postliminary duties and travel time involved are now required to be performed outside of the regularly scheduled 8-hour tour of duty. The memorandum dated May 6, 1970, of the then Acting Chief Patrol Agent, in this regard is in part as follows:

"Officers will report for duty at the traffic checkpoint at the hour on which their scheduled tour of duty begins and will remain on the checkpoint until they are relieved. For example, an officer who is scheduled to work from 8:00 a.m. to 4:00 p.m. at the traffic checkpoint on Highway 86 will report to Sector Headquarters early enough to get a Government vehicle and to drive to that checkpoint in time to relieve at 8:00 a.m. His relief would be expected to be at the traffic checkpoint at 4:00 p.m., after which the officer will return to Sector Headquarters.

"Officers assigned to traffic checkpoints where they are not to be relieved will follow the same procedure and will normally be expected to remain at the checkpoint to the end of their shift unless their supervisory officer instructs them to the contrary."

The Border Patrol has declined to compensate agents for the preliminary and postliminary duties and travel time involved at overtime rates under the authority of 5 U.S.C. 5542 partly in reliance upon the determination in General Accounting Office Claims Division Settlement Certificate Z-2423648, March 19, 1971. The Claims Division indicated therein that inasmuch as the claimant, a Border Patrol agent, assigned to the El Centro headquarters had received premium pay on an annual basis for administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2) he was precluded by section 550.163(b) of title 5, Code of Federal Regulations, from being compensated for such work under the provisions of 5 U.S.C. 5542.

Section 5545(c) of title 5, United States Code, provides with regard to compensation for administratively uncontrollable overtime work as follows:

"(c) The head of an agency, with the approval of the Civil Service Commission, may provide that—

\* \* \* \* \*

"(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than 10 per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position."

Section 550.163(b) of 5 CFR provides as follows:

"(b) An employee receiving premium pay on an annual basis under § 550.151 may not receive premium pay for irregular or occasional overtime work under any other section of this subpart. An agency shall pay the employee in accordance with other sections of this subpart for regular overtime work and work at night, on Sundays and on holidays."

You pose the following specific questions under the facts and law discussed:

"1. Should the time devoted to administrative work at Sector Headquarters, prior to and following highway checkpoint duty, be regarded as scheduled overtime or as administratively uncontrollable overtime?

"2. Should the time required for traveling to and from the highway checkpoint be regarded as scheduled overtime or as administratively uncontrollable overtime?"

The requirement of 5 U.S.C. 5545(c) that the hours of duty not be subject to administrative control is explained by the Court of Claims in Burich v. United States, 177 Ct. Cl. 139, 145 (1967), as follows:

"In claiming entitlement to overtime on an hourly basis, plaintiff emphasizes that his assignments were regularly scheduled. We do not disagree. But the point we would emphasize is that, as a consequence of his regular assignments, he experienced erratic and irregular periods of overtime work. His assignments were received on a daily basis, but neither the nature of the work nor the length of time required in its performance could be ascertained beforehand. To the extent that this work involved overtime, it is clear that such overtime could perhaps be anticipated, but it could not be regulated. And thus the point of distinction is that plaintiff was not assigned overtime; he was assigned a task which might require overtime. Under such circumstances, his additional duty hours represented administratively uncontrollable overtime rather than regularly scheduled overtime."

See also Byrnes, et al. v. United States, 163 Ct. Cl. 167 (1963), Fix, et al. v. United States, 177 Ct. Cl. 369 (1966), and 5 CFR 550.153.

More recently, in 48 Comp. Gen. 334 (1968), this Office held that the term "regularly scheduled overtime" refers to work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals as distinguished from the situation considered in B-168048, August 19, 1970, copy enclosed, where schedules were made on a day-to-day or hour-to-hour basis and where the amount of overtime varied with no discernible pattern. See also B-160165, January 6, 1967, and B-160472, January 5, 1967, copies enclosed.

Your submission does not indicate the regularity with which assignments to regular checkpoints were made other than to state that agents are assigned more than one-half of their workdays to the checkpoints and that assignments are posted 3 to 4 days in advance. We understand, however, that an agent is often assigned to work at a checkpoint on successive days and may be assigned to such duty for a full workweek or longer. In view of those facts, we believe that the particular days on which agents are assigned to checkpoints are regularly scheduled; further, the facts show that the time involved in traveling to and from those points and in performing preliminary and postliminary duties is reasonably constant and susceptible of being determined. These circumstances in themselves establish, in accordance with our holding in 48 Comp. Gen. 334, supra, that the functions performed before and after the regular 8-hour tours of the agents concerned involved "regularly scheduled" duty. In view of the information now presented it is apparent that the determination of our Claims Division, as referred to above, which was based on the assumption that the overtime involved was uncontrollable cannot be sustained.

The authority for compensation for regular overtime, 5 U.S.C. 5542, provides in pertinent part as follows:

"§ 5542. Overtime rates; computation.

"(a) Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of

duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:"

The questions which you pose indicate that the time involved in travel between headquarters and the checkpoints and in performing the ministerial duties at headquarters qualifies as authorized or approved overtime hours of work.

With respect to the payment of premium compensation for the travel time involved, subchapter V of chapter 55 of title 5 of the United States Code, including both sections 5542 and 5545, requires that travel time meet the criteria set forth at 5 U.S.C. 5542(b)(2) which provides as follows:

"(2) time spent in a travel status away from the official-duty station of an employee is not hours of employment unless—

"(A) the time spent is within the days and hours of the regularly scheduled administrative workweek of the employee, including regularly scheduled overtime hours; or

"(B) the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

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In regard to the agent's responsibilities while traveling, you state:

" \* \* \* While driving to the checkpoint, and later towards the close of the work day, driving from the checkpoint to headquarters the Agent is required to keep a lookout for suspected illegal aliens and to interrogate them. He is also notified by headquarters, on the radio, to stop and render interpreting service between Highway Patrol officers or policemen and their Spanish-speaking detainees \* \* \*"

Inasmuch as the agents' regular duties involved the search and apprehension of illegal aliens, the performance of essentially those duties while traveling to and from a regular checkpoint must be considered as the performance of work for purposes of section 5542(b)(2). 41 Comp. Gen. 82 (1961). This is in keeping with information received from the Immigration and Naturalization Service to the effect that they regarded the travel time involved as work although they considered it work for purposes of determining the number of hours of uncontrollable overtime performed by each agent and thus his entitlement to premium compensation under 5 U.S.C. 5545(c) and section 550.154 of the Civil Service Regulations.

For the reasons stated the time in travel as well as the time spent in preliminary and postliminary duties may be regarded as regularly scheduled overtime compensable under 5 U.S.C. 5542. Your questions are answered accordingly.

We note that, in addition to the above-discussed preliminary and postliminary duties and travel, agents are expected to complete the processing of cases and handle other enforcement duties which arise after their regular tours of duty have ended. They are thus required from time to time to work beyond the end of the scheduled shifts. Unlike the preliminary and postliminary duties and travel time discussed above, work of this nature qualifies as administratively uncontrollable under 5 U.S.C. 5545(c) and the criteria

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discussed above. Whether that work is "substantial" as required by 5 U.S.C. 5545(c) and, if so, the rate of premium compensation which may be authorized pursuant to the Civil Service Regulations, 5 CFR 550.151-164, cannot be ascertained from the information contained in your submission. We point out, however, that if such uncontrollable overtime meets the criteria prescribed, payment for that time under 5 U.S.C. 5545(c) and for regularly scheduled overtime under 5 U.S.C. 5542 incident to duty at the regular checkpoints is not precluded.

In that connection the following Court of Claims comments in Burich v. United States, supra, at page 145 are applicable:

"Based upon the foregoing, it is evident that premium compensation and regularly scheduled overtime relate to independent, mutually exclusive, methods for compensating two distinct forms of overtime work. The statute authorizes premium compensation where the hours of duty cannot be controlled administratively; it provides this in lieu of all other forms of premium compensation (i.e., compensation for night and holiday work) except for regularly scheduled overtime duty. Thus, the statute does not preclude an employee from receiving regular (hourly) overtime pay in addition to premium pay, but he cannot claim both for the same work. Neither may he claim hourly compensation for administratively uncontrollable overtime. Under the terms of this statute, administratively uncontrollable overtime falls clearly outside the scope of regularly scheduled overtime. This distinction plaintiff fails to bear in mind."

If the administratively uncontrollable duties which agents have performed without regard to the 2 hours overtime performed in connection with a day's assignment to a regular checkpoint are found either not to qualify for premium compensation under 5 U.S.C. 5545(c) or to justify a lower rate of premium pay than that which has been paid the resulting excess amounts received as compensation for administratively uncontrollable overtime should be set off against



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regular overtime compensation which is found to be payable under this decision.

Sincerely yours,

R.F. KELLER

[Deputy Comptroller General  
of the United States